IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 32

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the Steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC. et al.,
Cargo Claimants-Petitioners,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Statement

The respondents are owner and bareboat charterer respectively of the steamship *Venice Maru*, a merchant vessel

which sailed from Japan in July, 1934, laden with cargo for New York via Los Angeles and Panama Canal. On this voyage when between Los Angeles and Balboa fire broke out in sardine meal cargo stowed in No. 1 lower hold of the vessel resulting in damage to this and other cargo in holds 1 and 2 and to the vessel. The fire was extinguished at Balboa, whereupon the spoiled cargo was removed, the holds were cleaned, the undamaged cargo was restowed and the vessel then completed her voyage to New York.

At New York the petitioners who were owners of cargo that had been destroyed or damaged by the fire filed libels *in rem* against the vessel and *in personam* against respondent bareboat charterer (operator) for their damages whereupon the respondents as owner and bareboat charterer respectively of the vessel filed the petition herein for exoneration from or limitation of liability pleading the Fire Statute, (46 U. S. C. 182) and filing an *ad interim* stipulation for value herein in the sum of $245,000. as provided by Admiralty Rule 51 of this Court.[1] Petitioners having filed claims in the proceeding and answered the petition the cause came to trial on the issues joined. Both Courts below concluded that respondents were entitled to exoneration from liability to petitioners under the Fire Statute (46 U. S. C. 182) although they found that the vessel was unseaworthy with respect to the stowage of the sardine meal in No. 1 hold and that this caused the fire, holding that such unseaworthiness was not neglect or design of respondents since they had delegated the duty of laying out and supervising such stowage to an outside expert, which duty was delegable under said Statute, citing *Earle*

[1] 46 U. S. C. 186, which was Section 5 of the same enactment as the Fire Statute (Appendix A, infra p. 37), provides that a charterer who mans, victuals and navigates a vessel, i.e., a demise or bareboat charterer, is deemed an owner within the meaning of the Fire Statute. Both the general owner and the bareboat charterer may limit their liability in respect to the same vessel as respondents did. *Quinlan v. Pew* (C. C. A. 1st), 56 F. 111; *Monongahela River Consol. Coal & Coke Co. v. Hurst* (C. C. A. 6th), 200 F. 711, 713.

& Stoddart Inc. et al. v. *Ellerman's Wilson Line Ltd.* (*The Galileo*), 287 U. S. 420. The opinion of the District Court (R. 33-40) is reported in 39 Fed. Supp. 349. The opinion of the Circuit Court of Appeals for the Second Circuit affirming the decree of the District Court (R. 60-69) is reported in 133 F. (2d) 781.

The petitioners applied to this Court for a writ of certiorari posing five questions as reasons for granting the writ. This Court on May 10, 1943 granted the writ but limited it to the fifth question presented by the petition (R. 71) which was:

> "Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to *in personam* liability only?"

Petitioners moved on May 18 to enlarge the scope of the argument to cover other questions but this motion was denied.

Counsel for respondents, with the approval of the Alien Property Custodian, was retained in January 1942 by Standard Surety and Casualty Co. of New York, the bonding company which gave the *ad interim* stipulation in this proceeding, to continue the cause in the Circuit Court of Appeals and in this Court. The Alien Property Custodian by vesting orders No. 77 and 80, both dated July 30, 1942, vested in himself all property in the United States of respondent Kawasaki Kisen Kabushiki Kaisha; likewise by Vesting Order No. 1084 dated March 15, 1943, he vested in himself all property payable or owing to the Tokyo Marine & Fire Insurance Co., Ltd., a Japanese corporation, which advanced to Standard Surety & Casualty Company of New York cash collateral to secure the above *ad interim* stipulation. In the event of respondents' success in this cause this collateral, subject to general average and other claims, will belong to the Alien Property Custodian.

ARGUMENT

I

The Fire Statute gives the shipowner complete exoneration from liability for damage to cargo by fire on board his vessel: This clearly appears from (a) the plain language of the statute; (b) its legislative history; (c) its interpretation in early decisions of this Court; and (d) the line of decisions in the district courts and circuit courts of appeal covering a period of nearly ninety years which with the single exception of *The Etna Maru*, 33 F. (2d) 232, have held that the statute relieves the owner's ship from liability *in rem* as well as the owner *in personam*.

The words of the Fire Statute are as follows:

> "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of the owner" (46 U. S. C. 182, R. S. 4282).[2]

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[2] This was the first section of Act March 3, 1851, c. 43, par. 1, 9 Stat. 635, entitled: "An Act to Limit the Liability of Ship-Owners and for other Purposes." This section remains the same as originally enacted except that the following proviso which appeared in the Act of 1851 was deleted by the general repealer section of the Revised Statutes, 1874 (R. S. 5596): "Provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of shipowners", while the words "subject or" were at the same time omitted. This deletion and omission in no sense changed the meaning of the section in so far as the question before this Court is concerned. The Act contained six other sections, the second of which related to liability of shipowners for the carriage of precious metals, bullion and bank notes, the true character and value whereof had not been declared by the shipper, the third and fourth relating to limitation

A. The language is plain and should be construed liberally.

The words of the Statute are that no vessel owner "*shall be liable to answer for or make good to any person*" any loss or damage to cargo by fire on its vessel. These are general words used to express complete exoneration of liability.[3] They relieve the owner's vessel from a maritime lien based upon *in rem* liability as fully as they relieve him *in personam*. If such vessel were still subject to such a lien then the owner would have to pay the amount of the loss or damage by fire in order to obtain possession of

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of shipowner's liability for loss of or damage to goods by collision, etc., occasioned without said owner's "privity or knowledge", the fifth relating to the liability of a demise charterer, the sixth reserving existing remedies against the master, officers or seamen for embezzlement, etc., of property on board a vessel and the seventh concerning shipment of dangerous cargo, without the shipper's disclosure of its nature and character and finally a general provision declaring the Act to be inapplicable to the owners of canal boats, barges or lighters or of any vessels "used in rivers or inland navigation." Petitioner has printed some, but not all, of the provisions of this Act in Appendix A attached to its brief (pp. 43-46). In order that there may be no misunderstanding, the entire Act is printed in Appendix A hereto (*infra*, pp. 35-38) with notation of any subsequent amendments and reference to the Revised Statutes and U. S. Code sections to which each provision has been carried over.

[3] "*To answer*" means to pay the entire amount due, *American Surety Co.* v. *North Packing & Provision Co.* (C. C. A. 1st), 178 F. 810, or "to be responsible" (Webster's International Dictionary, Century Dictionary); the addition of the word "for", which is rarely met with, means to answer "*absolutely*" (Century Dictionary) or "guarantee" (Murray's A New English Dictionary on Historical Principles). "*To make good*" means "to fulfil an obligation", *State* v. *Ohlfest*, 139 Kans. 40, 30 P. (2d) 301, 303, *Queenan et al.* v. *Palmer*, 117 Ill. 619, Webster's International Dictionary; or "to indemnify", 38 C. J. 341, Century Dictionary. The use of the two terms together in this section shows an intention to remove every latent doubt that complete exoneration of the shipowner from all liability was to be understood. As this Court said in *Lincoln* v. *Ricketts*, 297 U. S. 373, 376: "In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation." And see, *De Ganay* v. *Lederer*, 250 U. S. 376; *Green* v. *Biddle*, 8 Wheat. 1; *United States* v. *Temple*, 105 U. S. 97.

her from the process of the Court. This would constitute answering for or making good the loss or damage from which he was relieved by the statute itself. The owner would "answer for" and "make good" the loss as completely by paying for the removal of a maritime lien on his vessel therefor as by paying the same amount to satisfy a decree *in personam* against himself. As the Circuit Court of Appeals below concisely put it:

> "To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise" (R. 63).

This Court construed the term "owner of any vessel" in the limitation of liability sections (three and four) of the same Act of March 3, 1851, of which the Fire Statute, containing the same term, was section one, to apply to actions *in rem* as well as *in personam* in *The City of Norwich*, 118 U. S. 468, with the following observation:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, * * *" (p. 503).

In the *Queen of the Pacific*, 180 U. S. 49, this Court held that a bill of lading clause, providing that neither the steamship company nor its stockholders should be liable unless notice of claim was presented within a specified time, protected the vessel as well as the carrier, saying:

> "In either event, the money to pay for such damage must come from the treasury of the company; and we

> ought not to give such an effect to the stipulation as would enable the owner of the merchandise to avoid its operation by simply changing his form of action" (pp. 52-3).

And see to the same effect *The Kensington* (C. C. A. 2d), 94 F. 885, reversed on other grounds 183 U. S. 263, where the Court said concerning such a clause:

> "The proposition contended for, that the clause in question provides only for the relief of the 'shipowner or agent' and does not inure to the benefit of the ship itself, which in this suit is called upon to respond only because as is alleged, the owner did not fully carry out its contract, seems to be without merit." (p. 888).

If the word "shipowner" or its equivalent in a contractual bill of lading provision covers the ship's liability *in rem* as this Court has thus held, a statutory exemption of the "owner of any vessel" should be given at least similar force and effect.

In *Norwich Co.* v. *Wright*, 80 U. S. 104, this Court in discussing the Act of March 3, 1851 said:

> "The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of the industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. * * * The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises" (p. 121).

In *Liverpool Nav. Co.* v. *Brooklyn Terminal*, 251 U. S. 48, this Court said that the purpose of the Act was "to give our shipowners a chance to compete with those of Europe" (p. 53), while in *American Car & Foundry Co.* v. *Brassert*, 289 U. S. 261, it said that its purpose was "to encourage investments in ships and their employment in commerce" (p. 263).

In *Walker* v. *The Transportation Co.*, 3 Wall 150, this Court said:

> "It is quite evident that the statute intended to modify the shipowner's common law liability for everything but the Act of God * * *." (p. 153).

As remedial statutes they "should be construed liberally in order to effectuate their beneficent purposes." *Larsen* v. *Northland Transp. Co.*, 292 U. S. 20, 24.

The construction which the Court in the *Etna Maru*, 33 F. (2d) 232, placed upon the Act is not merely harsh and far from liberal but is contrary to the plain meaning of the words used therein and leads to an unreasonable and absurd result.[4] This Court has frequently observed that words used in a statute must be interpreted in accordance with their common and accepted meaning and not restricted unless "called for by the sense, or the objects, or the mischiefs of the enactment." *United States* v. *Coombs*, 12 Pet. 72; *Chamberlain* v. *Western Trans. Co.*, 44 N. Y. 305. And see other cases cited in footnote 3, supra, p. 5.

B. The legislative history of the Statute shows that the intention was to exonerate completely shipowners from liability for loss of or damage to cargo by fire unless caused by their personal design or neglect.

In *Norwich Co.* v. *Wright* (1871), 80 U. S. 104, 117, this Court in an opinion by Mr. Justice Bradley discussed the

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[4] It is well established by the decisions of this Court that legislative enactments will be so construed as to avoid unreasonable and absurd results. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Ozawa* v. *United States*, 260 U. S. 178, 194; *United States* v. *American Trucking Associations*, 310 U. S. 534, 542-544; *Helvering* v. *Hammel*, 311 U. S. 504, 510-511. Even if the language of the Fire Statute were obscure, instead of being remarkably plain as is the case, a construction which limited its beneficent provisions to *in personam* liability would lead to unreasonable and absurd results as is shown by the language of this Court in *The City of Norwich*, 118 U. S. 468, 503, and in *The Queen of the Pacific*, 180 U. S. 49, 52-53, quoted supra, p. 6.

legislative history of the Act of March 3, 1851 and showed that it was patterned upon English legislation.

"By 26 George III (1786) this limitation of liability was extended to robbery and to losses in which the master and mariners had no part *and liability for loss by fire was entirely removed* as well as liability for loss of gold and jewelry unless its nature and value were disclosed" (p. 117).

"* * * In the light of all this previous legislation the Act of Congress was passed in 1851" (p. 119).

"* * * The Act of Congress seems to have been drawn with direct reference to all these previous laws, and with them before us, its language seems to be not difficult of construction" (p. 120).

In *The Main* v. *Williams*, 152 U. S. 122, this Court, in an opinion by Mr. Justice Brown, again stated that this Act of 1851 was patterned upon English statutes, the first being the Act of 7 George II, c. 15, passed in 1734 and subsequently amended so that "this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence and to damage done by collision, *while there was an entire exemption of liability for loss or damage by fire* or for loss of gold and jewelry, unless its nature and value were disclosed" (p. 127).

"The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of the Lexington * * * 6 How. 344 was decided by this Court. In this case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about $18,000 in coin which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among shipowners by this decision and for the purpose of putting American shipping upon an equality with that of other maritime nations Congress in 1851 enacted what is commonly known as the Limited Liability Act which has been incorporated into the Revised Statutes sections 4282 to 4290 * * *" (p. 128).

And see *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, where this Court in the majority opinion by Mr. Justice Bradley said:

> "Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship-owners, as common carriers, were held liable for any loss or damage caused thereby. The first section of the Act of 1851 was no doubt intended to change this rule. It was copied (all except the last clause) from the second section of 26 George III ch. 86 passed in 1786. The last clause of the section, excepting from its operation cases in which the fire is caused 'by the design or neglect' of the owners was probably implied in the English statute without being expressed as in ours" (p. 602).

Although the "Act was passed with very scanty scrutiny of its provisions. For a part of a day only it was under desultory discussion of the Senate." (The Limited Liability of Ship-Owners for Master's Faults—Harrington Putnam, Esq., 17 Amer. Law Rev. 1, 14), most of the discussion was with reference to the first section concerning loss of cargo by fire and the purpose of that section was fully stated. Senator Hamlin reported the bill from the Committee on Commerce on January 25, 1851 and it was considered by the Committee of the Whole. Concerning section 1 he said:

> "It proposes that no owner of any ship or vessel shall be liable to answer for or make good any loss or damage which may happen to any goods or merchandise whatsoever which shall be put on board any such vessel by means of any fire happening to or on board the vessel unless it is caused by the design of the owners" (23 Cong'l Globe, p. 331).
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> "This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine" (Id., p. 332).

On February 26, Senator Hamlin again brought up this bill, saying: "It is a bill which, I think, is just in its pro-

visions, and it places our commercial marine upon the same basis as that of England" (Id., p. 713). He moved to amend section 1 by inserting the words "or neglect" (Id., p. 715). He then said:

> "The first section of the bill provides for the protection of the owners of vessels against losses that happen by fire. That is the English law. *The English law is unqualified, and does not hold the owners of a ship or vessel liable for loss by fire in any case. I have added, however, an amendment to this section, which still holds the owner or owners of a vessel liable for losses by fire which shall be occasioned by his or their neglect*" (Id., p. 715).[5]
>
> "It simply holds the owner of the vessel harmless provided the loss did not happen by his fault or neglect" (Id., p. 715).

After reading the entire bill, Senator Hamlin said:

> "These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary, first from the fact that the English common law system really never had an application to this country and second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. *Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more*" (Id., p. 715).

Senator Butler and Senator Underwood, representing agricultural states, opposed the first section, the former saying: "You are going upon the broad proposition that

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[5] This Court in *The Eliza Lines*, 199 U. S. 119, 128, in an opinion by Mr. Justice Holmes, said: "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree." See also *Queen* v. *Globe & Rutgers Ins. Co.*, 263 U. S. 487, 493, where similar language is used.

when there is a loss by fire there shall be no liability. It is a principle which, if adopted, strikes deeply into an interest that concerns more persons than shipowners" (Id., p. 715). Senator Underwood said: "But if we are to retain this first section, changing the common law, which has been well settled since the case of Cox and Burnham I am opposed to it" (Id., p. 716).

In view of these and other objections the first section was finally amended by adding the following proviso: "Provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liabilities of ship-owners". The bill then passed the Senate on February 27 (Id., p. 738). It passed the House on March 3rd with no debate and bare mention (Id., p. 777).

C. The interpretation of the Statute by this Court shows it provided complete and total exoneration or exemption from liability for cargo damage or loss by fire.

Although this Court has not previously had before it the precise question raised herein on this writ, it has frequently discussed the Statute and defined its meaning. It was first before this Court in 1860 in *Moore* v. *American Transportation Co.*, 24 How. 1, a fire case arising on the Great Lakes in which it was held that the Statute was applicable in spite of the last sentence which provided that the act did not apply to vessels "used on rivers or inland navigation". The Court (majority opinion by Mr. Justice Nelson) summarized the act as follows:

> "*The act not only exempts the owner from the casualty of fire*, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight" (p. 39).

The Statute was again before the Court in 1865 in *Walker* v. *The Transportation Co.*, 3 Wall. 150, where it was said:

> "It is quite evident that the statute intended to modify the ship-owner's common-law liability for everything but the act of God and the king's enemies. *We think that it goes so far as to relieve the shipowner from liability for loss by fire* to which he has not contributed either by his own design or neglect. *By the language of the first section the owners are released from liability for loss by fire* in all cases not coming within the exception there made" (p. 153).

See to same effect *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, 646.

In 1871, in *Norwich* v. *Wright*, 80 U. S. 104, this Court in an opinion by Mr. Justice Bradley discussing the Act of 1851 said:

> "The first section *exempts ship-owners from loss or damage by fire to goods on board the ship*, unless caused by their own neglect" (p. 120).

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* (1883), 109 U. S. 578, the Act of 1851 was again before this Court in a case involving damage to cargo by fire and the Court analyzed carefully the relationship between section one, concerning a shipowner's liability for such fire damage, and section three, regarding his right to limit liability where the fire had occurred without his privity and knowledge. The issue was whether, the fire having been found by a state court jury to have been due to the neglect of the shipowner under section one, such owners could file a petition for limitation of liability under section three. After discussing the legislative history of section one in the language quoted supra, page 10, this Court said in the majority opinion by Mr. Justice Bradley:

> *"In all cases of loss by fire, not falling within the exception, the exemption from liability is total. But there is no inconsistency or repugnancy in allowing*

a partial exemption in cases falling within the third section; that is cases of loss by fire happening without the privity or knowledge of the owners. They may not be able under the first section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. *The conditions of proof in order to avoid a total or a partial liability under the respective sections are very different.*

It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability if they fail in the first defence; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other and requires a different class or degree of proofs. That is all" (pp. 602-03).

The dissenting opinion by Mr. Justice Field concurred in by Mr. Justice Gray was based upon the theory that liability of shipowners for cargo damage by fire was controlled exclusively by section one (fire statute) and was not within section three governing limitation of liability; also that if a fire was caused by the design or neglect of the owner it necessarily must have been with his privity and knowledge (pp. 605-06). Even this dissent admitted that "*The first section exempts them* [*shipowners*] *from all liability for loss or damage by fire of goods shipped on board their vessels, unless such fire is caused by their design or neglect*" (p. 604). This interpretation, by all members of the Court, of the owner's liability under section one is not dictum but in view of the issues involved is a definite holding.[6] This being true, it necessarily follows

[6] The cited case was before this Court on writ of error to the Supreme Judicial Court of Massachusetts, which had taken jurisdiction of a suit brought by cargo owners and had entered a judgment for plaintiffs on verdict of a jury (113 Mass. 495 and 125 Mass. 292) despite the issuance of a restraining order in the limitation proceedings in the United States District Court for the Southern District of New York. This and other litigation arose out of

that section one extinguishes maritime liens on the owner's vessel as well as the owner's *in personam* liability. A similar case and a similar conclusion is to be found in *Hines* v. *Butler* (C. C. A. 4th), 278 F. 877, 879.

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the loss by fire of the *Oceanus* with a valuable cargo aboard alongside her dock in New York on May 24, 1868. The value of the vessel in her wrecked condition was $5,000. Other owners of cargo brought suit against the shipowner for their losses in the state courts of New York and Rhode Island. This Court held that the limitation proceedings in the District Court superseded all other actions and suits for the same loss or damage in the state or federal courts because losses by fire on board ship fell within both the first and third sections of the Act of 1851, and that, therefore, the Massachusetts court should not have proceeded further when the limitation proceedings were properly pleaded. The interpretation of both the first and third sections of the Act were necessary to this holding of the Court. The limitation proceedings before the United States District Court for the Southern District of New York are reported under the name of *In re Providence & N. Y. S. S. Co.*, 6 Ben. 124, Fed. Cas. No. 11,451 (1872). The question there before the Court was whether the shipowner (petitioner for limitation of liability) was entitled to an order therein restraining suits against it in other jurisdictions, the argument being made on behalf of plaintiffs in one of the state court suits that there was no right to file a petition to limit liability with respect to a claim for loss by fire which was governed solely by the first section of the Act of 1851, now 46 U. S. C. 182. In discussing the statute and deciding in favor of the shipowner, Blatchford, J., subsequently Mr. Justice Blatchford of this Court, said (20 Fed. Cas. at p. 20):

> "*But it by no means necessarily follows, that, because the fire happening to or on board the vessel was caused by the neglect of the corporation, so as not to give to it the benefit of the total exemption provided for by the 1st section, the loss by such fire of property shipped on board of the vessel* was not a loss occasioned without the privity or knowledge of the corporation, so as to deprive it of the benefit of the limited liability provided for by the 3d section."

Inasmuch as the shipowner had filed a stipulation to cover the value of the vessel in the limitation proceeding, the cause was *in rem*; so that the above quoted holding that the shipowner was entitled to "total exemption" unless the loss were due to its design or neglect under the first section is, like the holding of this Court, supra, pp. 13-14, directly in point. In *Knowlton* v. *The Providence & N. Y.*

D. With the single exception of *The Etna Maru* (C. C. A. 5th), 33 F. (2d) 232, all of the cases under the Fire Statute where the point has been in issue have held that maritime liens on the ship for cargo damage are extinguished by the Statute unless the fire occurred with the personal design or neglect of the owner; the issue was not raised by brief or argument in the *Etna Maru* and the decision of the Circuit Court of Appeals was *sua sponte*.

The earliest reported case *in rem* for damage to cargo by fire following the Act of March 3, 1851 is *Dill* v. *Bertram*, Fed. Cas. 3910, in the United States District Court for the Southern District of New York in 1857. It was tried before

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S. S. Co., 53 N. Y. 76 (1873), litigation regarding cargo loss arising out of the same disaster came before the Court of Appeals of New York on suit brought by one of the cargo owners, the question before the Court being whether the shipowner was entitled to a stay because of the pendency of the limitation proceedings in the United States District Court for the Southern District of New York. In interpreting the statute the Court of Appeals, by Peckham, J., said:

> "The purpose and language of this act would seem to declare that the loss by fire referred to in the first section, not caused by 'the design or neglect of the owners,' *in no contingency could be compensated by any proposition of the value of the ship and freight to be distributed under the subsequent provisions. If the fire and loss occurred without the design or neglect of the owners of the ship, then it is declared that they incur no liability whatever*" (p. 82).
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> * * * * * * *
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> "If the plaintiffs succeed in their action, they are entitled to recover their whole loss. If they fail, they are entitled to nothing. In no event are they entitled to any dividend in the value of the ship and freight that may be declared in the proceedings in the District Court" (p. 85).

The Court of Appeals was, as shown by the decision of this Court, in error in its conclusion that a loss by fire did not come under the third section of the Act of 1851. Its interpretation of the first section, however, that the shipowners "incur no liability whatever" for cargo loss by fire if caused without their design or neglect is sound and in accordance with all of the other authorities which have discussed the subject, with the single exception of the *Etna Maru*, supra.

Judge Betts, an experienced admiralty judge, who dismissed the libel with costs, saying:

> "But if the saltpetre, under the facts, is to be regarded as laden on board the ship, then it is brought under the provisions of the Act of Congress of March 3, 1851 (9 Stat. 635 c. 43 § 1) and the loss and damage to it by fire alongside the ship, must be regarded as happening to goods 'shipped, taken in, or put on board' *the ship, and the owners are therefore exempt from responsibility.*"

Next followed *Keene* v. *The Whistler*, Fed. Cas. 7645 (2 Sawy. 348), in 1873 in the District Court for the District of California. This was an action *in rem* for damage to cargo destroyed by fire on board the ship; the fire statute was pleaded in defense. The Court, after citing *Walker* v. *Transportation Co.*, 3 Wall. 150; *Wilson* v. *Dickson*, 2 Barn. & Ald. p. 13, and *The Volant*, 1 W. Rob. 383, said:

> "From these authorities, it results that, though the negligent master, who is a part owner, is liable personally in either capacity for the loss caused by his negligence, the other innocent part owners are protected by the statute, in a suit brought against all the part owners jointly or *in rem* against the vessel, where the property must necessarily be taken to satisfy the decree; or if she has been bonded, the owners must satisfy the decree out of their own funds. The libel must therefore be dismissed."

Then followed *The Rapid Transit*, 52 F. 320, in the District Court for the District of Washington in 1892, in which the facts were that a steamer with a cargo of lime aboard took fire and was beached and scuttled to extinguish the flames causing the destruction of the lime. The owners of the lime libeled the ship *in rem* which in the meantime had been purchased by another who claimed the vessel and pleaded the fire statute. The Court dismissed the libel with an opinion reading:

> "The claimant purchased the vessel after the fire, and he claims the protection of this statute on the

ground that if the former owners are, by its terms, shielded from liability upon their contracts, the vessel is also entitled to immunity from proceedings *in rem*. I find that there is in the proofs absolutely nothing to support an accusation against the owners of any intentional act or negligence which could have been the cause of the fire and consequent injury to the vessel and her cargo; therefore the statute affords a complete defense as against the claim originally put forth by the libelants" (p. 321).

Next in point of time was the *Etna Maru* (C. C. A. 5th), 33 F. (2d) 232, 234, in 1929. This was an action *in rem* for cargo damage by fire in which the shipowner pleaded the fire statute. The District Court entered decree for libelant on the ground that the owner had not exercised due diligence to make the ship seaworthy (20 F. [2d] 143). No suggestion was made in the District Court or in the Circuit Court of Appeals in either brief or argument that the fire statute would not relieve the owner's ship from liability *in rem* where the fire occurred without the owner's design or neglect. However, the Circuit Court of Appeals *sua sponte* held that the fire statute while relieving the owner *in personam* did not relieve the ship, in an opinion reading as follows:

"However, it seems to be the theory of appellant that, because of the provisions of the fire statute, if the owner is free from personal negligence, the ship is also exonerated in any event. * * * The statute relied on was part of the Act of March 3, 1851, carried into the Revised Statutes as sections 4282, 4283 et seq. (46 U. S. C. A. §§ 182, 183 et seq.). These sections are designed to modify the common-law liability of a shipowner, not only as to losses caused by fire, but also by collision and other accidents. They are in *pari materia* and must be construed together. They were not intended to, and do not, entirely excuse an owner for loss by fire in every event, even though not caused by his own design or negligence. This is tersely and clearly stated by Mr. Justice Bradley in New York Cent. R. Co. v. Lockwood, 17 Wall 357-361 where he

said referring to the act of 1851 and discussing limitation of carrier's liability generally: 'Though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employes and liable without limit for his own negligence.' See also Walker v. Transp. Co. 3 Wall 150; Norwich Co. v. Wright, 13 Wall 104; Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578. • • • There is nothing in the statute to bar a recovery against the ship. Richardson v. Harmon, 222 U. S. 96; Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 334; The Malcolm Baxter Jr., 277 U. S. 323."

None of the cases cited in the opinion support the principle laid down. *New York Cent. R. Co.* v. *Lockwood*, 17 Wall. 357, was a case of personal injury to one riding on a drover's pass and neither a ship nor a fire was involved; the language of Mr. Justice Bradley was dictum. As I have shown supra, pages 13-14, this dictum is directly contrary to the holding of this Court in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, and to that of the United States District Court for the Southern District of New York and of the New York Court of Appeals in the same litigation (footnote 6, supra, p. 14). The doctrine of the *Etna Maru*, insofar as it held that lack of due diligence to make the vessel seaworthy would deprive the owner of the protection of the fire statute was expressly disapproved by this Court in *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.* (*The Galileo*), 287 U. S. 420 (footnote 3 on p. 427). This Court likewise expressed doubt of the doctrine of the case that the statute did not relieve the owner's ship by calling attention to the fact in the same note that it was contrary to *The Rapid Transit*, 52 Fed. 320, 321. However, that point was not in issue since the *Galileo* action was not *in rem*.

The Salvore, 60 F. (2d) 683 (C. C. A. 2d) (1932), is next in point of time. The libel was both *in rem* and *in personam* for cargo damage by fire and the shipowner petitioned for exoneration from and or limitation of liability. The fire

statute was pleaded. Decrees dismissing the libel and granting exoneration to the petitioner were affirmed, the Court on appeal saying:

> "Likewise their" (libelants) "failure to prove either that the fire was caused by the neglect or design of the shipowner, since the burden was upon them, The Folmina, 212 U. S. 362, *gives the ship the benefit of the fire statute* (46 U. S. C. A. §182) which was incorporated in the bills of lading, Walker v. Western Transportation Co., 3 Wall 150, The Galileo, 54 F. (2d) 913."

No contention appears to have been made in that case, either in the District Court or in the Circuit Court of Appeals, that the fire statute was not applicable to suits *in rem*.

Likewise *The Older* (1933) (C. C. A. 2d), 65 F. (2d) 359, was an action *in rem* and *in personam* for damage to cargo by fire. The fire statute was incorporated in the charter party. The Court reversed the decree below which held the ship liable (1 Fed. Supp. 119) and dismissed the libel. There is nothing in the reports to show any contention that the fire statute did not apply to a suit *in rem*.

Next followed *The President Wilson* (D. C., N. D. Cal., S. D. 1933), 5 Fed. Supp. 684. This was a libel *in rem* for loss by fire of 2,640 bags of sugar on board a barge. The fire statute was pleaded. The Court dismissed an *in rem* libel, stating:

> "The libelant maintains that the 'fire statute' is not applicable in proceedings in rem. * * * First does the 'fire statute' apply? Libelant contends that the 'fire statute' is limited to personal exemption, and does not preclude liability against the vessel itself; and as this is an action in rem, recovery may, therefore, be had against ship. To sustain this position libelant relies upon The Etna Maru (D. C.), 20 F. (2d) 143, and Id. (C. C. A. 5th) 33 F. (2d) 232, 234. These Etna Maru decisions, *ubi supra*, are not convincing authority in support of libelant's contention. * * *

> Undoubtedly, the weight of authority clearly holds that, in actions in rem for the recovery of damages caused by fire, the 'fire' statute' grants immunity of liability to the vessel, as well as personal exemption; *vide* The Rapid Transit (D. C.), 52 F. 320; Keene v. The Whistler, Fed. Cas. No. 7645; Dill v. The Bertram, Fed. Cas. No. 3910. In the latter case the 'fire statute' was even construed to include cargo which had been brought alongside the ship for loading. In the very recent opinion in the cases of Dingfelder et al. v. S. S. Brenta (Boera et al. v. S. S. Brenta), 5 F. Supp. 682 • • • the 'fire statute' precluded liability for a cargo of onions destroyed by fire" (685-6).

The next case in point of time was *The Buckeye State*, 39 Fed. Supp. 344 (D. C., W. D. N. Y. 1941). This was an action *in rem* for cargo damage by fire; the fire statute was pleaded in defense. The Court found the damage was due to heat rather than fire and decreed for libelant. With reference to whether the fire statute leaves the owner liable to the value of the vessel it said:

> "The further claim is made by the libelant that where there is fire damage the fire statute *supra* leaves the owner liable to the value of the vessel and it cites the Etna Maru, 5 Cir., 33 F. 2d 232, 233, certiorari denied 280 U. S. 603. No implication is to be drawn from the denial of certiorari that the Supreme Court indicates any expression upon the merits. Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401. The decision in Etna Maru, supra, seems to be against the weight of the authorities and not in accord with the plain meaning of the statute. The Rapid Transit, D. C., 52 F. 320; The President Wilson, D. C., 5 F. Supp. 684; Keene v. The Whistler, Fed. Cas. No. 7645; Dill v. The Bertram, Fed Cas. No. 3910. In a footnote in Earle & Stoddart v. Wilson Line supra, reference is found to Etna Maru supra and the Rapid Transit supra. The indication there seems to be that the Etna Maru decision was disapproved" (pp. 346-7).

In the cause at bar the petitioners first contended that the fire statute did not extinguish maritime liens for cargo

damage in their brief in the Circuit Court of Appeals. The Circuit Court of Appeals in an opinion by Learned Hand, the most experienced admiralty judge in the Second Circuit, where a large proportion of the admiralty cases in the United States are brought, disposed of the contention as follows:

> "A preliminary question arises as to the liability of the ship *in rem*, assuming that the owner is not liable *in personam*. The claimants argue that the statute does not destroy any liens upon the ship, for it is to be read in *pari materia* with § 183 of Title 46, U. S. Code. Such indeed appears to have been the opinion of the Fifth Circuit in *The Etna Maru*, 33 Fed. (2d) 232, which also held that unseaworthiness of the ship barred exoneration under the Fire Statute. So far as that decision retains any authority after *Earle & Stoddard* v. *Wilson Line*, 287 U. S. 420, we cannot agree. § 182 gives complete exoneration of liability; § 183 only a limitation of liability. To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise. Whether, if the charterer were liable, *in personam*, a lien would attach to the ship on the theory that a bareboat charterer is the owner *pro hac vice*, we need not say, for, as will appear, we agree that it was not liable *in personam*." (R. 63-4).

Petitioner's criticism (brief, pp. 19, 21-2) of the last two quoted sentences is quite unsound. What the Court clearly meant was that the ship was not a jural person, capable of wrongdoing by itself; that a lien can only arise by reason of the wrongdoing of a person "lawfully in possession of her whether as owner or charterer" (*The Barnstable*, 181 U. S. 464, 467); that the respondent bareboat charterer, in rightful possession of the vessel, did not create a lien on her for the damage by fire since the fire statute had exon-

erated it from any such damage caused without its design or neglect.

See also "The Limited Liability of *Ship-Owners for Master's Faults*" by Harrington Putnam, Esq., 17 Amer. Law Review 1, 14 where in discussing the Act of 1851 it is said: "*The first section giving complete immunity in case of fire* and the second section requiring notice of valuables shipped to be given in writing need no comment." Judge Putnam was an eminent proctor in admiralty and was counsel in many important cases in this Court.

Inasmuch as the first section of the Act of 1851 (Fire Statute) has been uniformly construed for a period of almost 90 years (with the exception of *The Etna Maru*, supra, which was an exotic in our law and for which there is no authority) as completely exonerating the shipowner from liability not only in a suit *in personam* but also from liability in a suit *in rem* against his vessel, the construction thus adopted should not be disturbed.

This Court has frequently pointed out that a long and uniform construction given to a federal statute by the lower federal courts ought not to be set aside. The rule is thus summarized in the headnote to *Missouri* v. *Ross, Trustee*, 299 U. S. 72:

> "This Court will hesitate to disturb a long and uniform construction given to a federal statute by the lower federal courts; and the fact that the provision so construed has not been changed by Congress, although provisions closely related to it have been amended, imports a legislative adoption of such construction. (P. 75.)"

So in *United States* v. *Ryan*, 284 U. S. 167, the present Chief Justice said at page 174 in discussing the interpretation of R. S. §3453:

> "If the point were more doubtful, we should hesitate to set aside, at this late date, the uniform construction given to the section with respect to this question by the lower federal courts for more than sixty years."

The construction of the Fire Statute advanced in *The Etna Maru,* supra, would nullify it except in case of the vessel's total loss because the cargo owner could always avoid the immunity given by bringing his action *in rem.* This construction would in effect change the Statute in actions *in rem* from one of exoneration to one of mere limitation of liability to the value of the vessel thus making it substantially equivalent to the third section of the Act of March 3, 1851. But this would be contrary to the holding of this Court in *Providence & N. Y. S. S. Co.* v. *Hill,* 109 U. S. 578, in which the liability under the two statutes is contrasted. It would add a new exception to the "complete immunity granted" by the Fire Statute contrary to this Court's holding in *Earle & Stoddard* v. *Wilson Line,* 287 U. S. 420, 425.

II

While there was a maritime lien upon the *Venice Maru* for damage by fire to her cargo, it was based upon the loading of such cargo upon her pursuant to the agreement between the bareboat charterer-respondent and the shippers; the master was the employee of said respondent and, even had he signed the bills of lading (which he did not), they would have been the contracts of such respondent and not independent contracts of the master or vessel, as petitioners contend.

Petitioners' brief is unreal. Apparently abandoning any defense of the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 F. (2d) 232, upon the ground given by that Court—namely, that the first and third sections of the Act of 1851 are *in pari materia*—it contends that, in the cause at bar, the contract of transportation was made by the master and created a maritime lien upon the ship independently of any contract of either of the respondents. From this it argues

that the maritime lien on the vessel was in no way connected with the liability of either of the respondents and *ergo* was not extinguished by the Fire Statute. Nothing could be further from the fact.

The District Court below expressly found that the bills of lading were "duly issued either by the head office of the" respondent bareboat charterer which operated the vessel or "by one of its sub-offices or by its duly authorized agents" (Findings 2 & 3, R. 40). Answers of said charterer respondent to the 37th, 38th and 45th interrogatories, annexed to petitioners' answer, which were offered in evidence at the trial by petitioners, specifically showed that the bills of lading were *signed* by the head office or the sub-offices or duly authorized agents of said respondent bareboat charterer; these answers, while printed in the complete record (pp. 44-45) in the Circuit Court of Appeals, were not included in the brief transcript of record which was stipulated in this Court in view of the limitation of the question to be presented (R. 71). In order that there may be no misunderstanding, I shall take the liberty of printing these three interrogatories and their answers from the Record in the Circuit Court of Appeals as Appendix B (infra p. 39).

The printed words "for master" at the end of the front page of the printed form of the bill of lading (Ex. 9, R. 30), underneath the space left for the signature, do not make what otherwise is a charterer's contract into an independent master's contract. The document bears both the trade name ("K" Line) and the common name (Kawasaki Kisen Kaisha, the word "Kabushiki" meaning Incorporated being omitted,) of the respondent charterer at the top and states in its body that the vessel belongs to or is employed "by The Kawasaki Kisen Kaisha (hereinafter called Carriers) commanded by T. Inouye for the present voyage * * *". At the bottom of the front page, following the notation of the marks and numbers of the merchandise and of the freight and charges, appears the clause, "In witness whereof, *the owners or agents of the*

said vessel have signed——Bills of Lading, one of which Bills of Lading being accomplished the others to stand void". At the bottom of the front page on the extreme left side, in parenthesis, are the words "Subject to conditions and exceptions as per overleaf". The overleaf is the back page of the bill of lading (R. 30 B) where are to be found the exceptions and conditions of the contract between the shipper and "the carrier" which had been previously identified on the front page as respondent bareboat charterer. The contract was clearly that of said respondent and not an independent contract for the ship by the master who never even signed the document. Even had the master signed it, the contract would still have been that of the respondent charterer since he was its employee under the terms of the charter party which provided (Article No. Two) that "the charterers, at their own risk and expense, carry all the business of these steamers' operations, such as appointments, dismissal of officers and crew * * *" (R. 31-2).

This Court in *Pendleton* v. *Benner Line*, 246 U. S. 353, held that bills of lading signed by the master of a vessel were, nevertheless, contracts of the charterer, saying:

> "The bills of lading were signed by the master or agents of the vessel (the Benner Line) and it is contended, bound only the vessel. * * * We agree with the lower Courts that the Benner Line did not disappear from its contract to carry the goods when the bills of lading were signed and that it would have been answerable to the owners, or to the insurance companies, when they became subrogated to the owners' rights, if they had elected to sue it" (p. 355).

As the charter involved in the cited case was not a demise, the master was the employee of the owner, not the charterer; in the cause at bar, the charter was a demise and the master was the employee of the charterer. There is therefore even more reason for holding that the bill of lading in the cause at bar is the contract of the charterer than there was for such a holding in *Pendleton* v. *Benner Line*, supra. The petitioners herein understood this fully;

their libels were *in personam* against the charterer-respondent on the bill of lading contract and *in rem* against the *Venice Maru*, not solely *in rem* as one might infer from their brief at page 4.

The cases cited by petitioners on maritime liens for mariner's wages, or liens under statutes for forfeiture of vessels which engage in prohibited activities, or liens arising out of collisions, or liens for necessaries furnished to a vessel are all inapplicable. They are based upon different grounds than a lien for cargo damage. There is no such thing as a master's independent contract of affreightment; he is always acting as an agent, either for the owner or the charterer and the contract is that of his principal. Nor is there ever in reality any vessel contract of affreightment independent of that of her owner or charterer. The lien upon a ship for the safe carriage, due transport and right delivery of cargo is created solely by the union of ship and cargo which takes place when the goods are loaded aboard the ship pursuant to a contract of affreightment between the shipper and carrier and such lien is no more substantial even if the ship's master signs the bill of lading. In fact no bill of lading is necessary for the creation of such a lien. *The Saturnus* (C. C. A. 2d), 250 F. 407. The lien is reciprocal, the ship being bound to the cargo to carry out the agreement of transportation and the cargo bound to the ship for freight and charges. *The Maggie Hammond*, 9 Wall. 435, 449-50; *Schooner Freeman* v. *Buckingham*, 18 How. 182; *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U. S. 490.

As this Court said in its opinion by the present Chief Justice in *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corporation*, 290 U. S. 117, 121:

> "While there has been a lack of unanimity in the decisions as to the precise limits of the lien in favor of the cargo, see Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U. S. 490, the cases are agreed that the *right to the lien has its source in the contract of affreightment and that the lien itself is justified as a*

means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for nonperformance. See The Freeman, 18 How. 182, 188; Vandewater v. Mills, 19 How. 82, 90; Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra; The Flash, 1 Abb. Adm. 67; The Rebecca, 1 Ware. 188; Scott v. The Ira Chaffee, 2 Fed. 401. This engagement of the vessel, or its hypothecation, as distinguished from the personal obligation of the owner, does not ensue upon the mere execution of the contract for transportation. Only upon the lading of the vessel or at least when she is ready to receive the cargo—when there is 'union of ship and cargo'—does the contract become the contract of the vessel and the right to the lien attach. No lien for breach of the contract to carry results from failure of the vessel to receive and load the cargo or a part of it. See The Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra."[7]

[7] There is nothing to the contrary of this rule in the cases cited by petitioner. *The Esrom* (C. C. A. 2d), 262 F. 953 and 272 F. 266, which involved goods shipped on a vessel that was under a charter which was not a demise, held: "The ship may be held liable in rem for damages to the cargo even though no bill of lading or contract of affreightment is signed by the master" (p. 269 of 272 F.). "* * * the obligation between the ship and cargo is mutual and reciprocal and does not attach until the cargo is onboard or in the custody of the master" (p. 270 of 272 F.). "There did exist between shipper and the personified ship mutual obligations dependent wholly upon that union of ship and goods arising from the lading of the former on the latter, lately discussed at some length in *The Saturnus*, 250 F. 407. But that union did not *per se* give rise to any 'privilege' under continental marine law even for damages through delay occasioned by the fault of the owner. The Ripon City, 102 F. 182" (p. 273 of 272 F.). In *The Themis* (*Gans S.S. Lines* v. *Wilhelmsen*) (C. C. A. 2d), 275 F. 254, 262, it was held: "It is sufficiently shown in Judge Hand's opinion that by acceptance of cargo, the ship became liable in rem for due performance of the contract of affreightment. But when (Barber & Co.'s authority to sign for the master being undisputed) the master of a ship chartered but not demised which was the condition of Themis, issues bills of lading, we hold that the contract evidenced thereby is not only the ship's contract and that of the time or other charterer who caused their issue, but that of the owner, whose master (i. e. authorized agent) issued the same. Therefore, in this instance the shippers had, beyond the obligations of the ship,

There is no liability on the ship unless there is liability on the owner or operator under the contract of affreightnt. The general owner in the cause at bar was not

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right to look to all three respondents, and hold any or all of them sonally liable for right fulfilment of the bills." In *The Poznan* . C. S. D. N. Y.), 276 F. 418, 432, Judge Learned Hand said in a t in rem against the ship, her owner and time charterer: "Thus the irter party clearly contemplated bills of lading running in the name the Acme Company (charterer) and they all so read. Most of m were in fact signed by the company but a few by the master. far as concerns the ship it makes no difference. Being once laden was bound for right delivery though the charterers sign. The ripides (D. C.), 52 Fed. 161; The Centurion (D. C.), 57 Fed. 2; The Freda (D. C.), 266 Fed. 551. In The Esrom (No. 2), 272 d. 266 (C. C. A. 2d), Feb. 24, 1921, it was agreed by all the judges t the charterer's bill of lading bound the ship for right delivery. leed the cargo would have a 'privilege' against the ship for right ivery, even without any bill of lading. The Saturnus (C. C. A.), 250 Fed. 407." In *The Capitaine Faure* (C. C. A. 2d), 10 F. d) 950, the Court held a ship liable in rem to cargo loaded aboard ere the bills of lading were signed by the time charterer with the nsent of the owner's master and said: "A contract of affreightment bind the ship must be executed by a person authorized to do so the shipowner, * * *" (p. 961). In *The Saturnus* (C. C. A. 2d),) Fed. 407, 414, the Court in an opinion by Judge Hough said: his litigation exemplifies a common tendency to regard any float- property used in the performance of a contract, as in some sort pledge or surety for satisfactory performance; such security to enforced by asserted maritime lien. No such principle is known the admiralty. The ancient and customary lien of the sea is maintained, nor was it created (so far as history reveals its gin) for the convenience or assurance of parties, but for the ouragement of commerce and shipping, as a presumed benefit to public, in respect of an occupation hazardous and uncertain ond most land ventures. In respect of carriage of goods in parlar, every public benefit has for centuries been deemed obtained en goods were liable for freight, and ship for safe and sound ivery of goods, the mutuality of relation thus growing out of the of transport, not the making of a contract for transportation. ything more than this multiplies secret liens and hampers instead advances ease and freedom of commerce" (p. 414). If the Phebe d. Cas. No. 11064 (brief pp. 48-62) holds more than this it is trary to prevailing authority. There is no special significance to given to a bill of lading signed by the master except that where is appointed and paid by the shipowner and the vessel is under a irter which is less than a demise it may bind the owner *in per-am* on the principles of agency. Such a bill of lading has no h significance as petitioner contends at brief pp. 23-26.

liable because it made no contract with the shippers and had nothing to do with the ship's operation, stowage or control (Finding 1, R. 40). The operator (respondent bareboat charterer), under whose contract of affreightment the cargo was loaded, was freed from liability for damage to such cargo by fire under the provisions of the Fire Statute from which it follows that the vessel was likewise freed since "the right to the lien has its source in the contract of affreightment" (*Krauss Bros. Lumber Co.* v. *Dimon S.S. Corporation*, supra p. 27). This is the sense in which the Circuit Court of Appeals wrote the following words which have been unwarrantedly criticized by the petitioner:

> "'To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise. Whether, if the charterer were liable *in personam*, a lien would attach to the ship on the theory that a bareboat charterer is the owner *pro hac vice*, we need not say, for, as will appear, we agree that it was not liable *in personam*" (R. 63-4).

This was a sound application of the law as laid down by this Court in the affreightment cases cited above. No judge in the country has been more mindful of "the Admiralty tradition" which petitioner appears to feel is in process of destruction (brief, 22-3) or more zealous in its protection than Judge Learned Hand who wrote the opinion in the Circuit Court of Appeals. In his continuous service of more than thirty-four years as a federal judge he has passed upon, either as trial judge or appeal judge, many of the most important admiralty cases that have arisen in the Second Circuit, including a number of those cited in petitioners' brief.

Judge Goddard in *The Cabo Hatteras*, 5 Fed. Supp. 725, 728 (D. C., S. D. N. Y.), called attention to the fact that section three of the Act of 1851 which provides for limitation

of liability "is merely an enactment of the ancient law of the sea *while the fire statute which is not a statute of limitation but of exoneration, owes its origin to an English fire statute first passed in 1786 (26 Geo. III c 86)*". From this one may properly infer that insofar as the fire statute was concerned it was the Court's opinion that it was not incumbered with any of the ancient doctrines of the sea but was free and absolute. There are many customs and usages of the sea that are not part of the law of admiralty as enforced in our courts. As this Court said in *The Western Maid*, 257 U. S. 419, majority opinion by Mr. Justice Holmes:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. The Lottawanna, 21 Wall. 558, 571, 572; Dalrymple v. Dalrymple, 2 Hagg. Cons. 54, 58, 59; Dicey, Conflict of Laws, 2d ed. 6, 7. * * * It may be said that the persons who actually did the act complained of may or might be sued and *that the ship for this purpose is regarded as a person.* But that is a fiction not a fact and as a fiction is a creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed." (pp. 432-3).

As the Circuit Court of Appeals below said, this "fiction" of personality of the ship is "not to be applied to defeat a statute designed to protect and foster maritime enterprise." (R. 63).

There is no significance in the fact that 46 U. S. C. 181, section two of the Act of 1851, concerning valuable cargo shipped without notice, excuses both the master and

the owner from liability whereas section one excuses merely the owner (brief 6, 13). As the master was the person who was to receive the article from the shipper, and if its value was disclosed enter the amount thereof in the bill of lading, he was personally liable therefor, so that it was only proper that he should be released from liability for more than the value of the goods as declared by the shipper. For all other embezzlement, injury, loss and destruction he and the officers and mariners were liable under section six of the Act—46 U. S. C. 187. "By the English and American maritime law the master is responsible for the loss of cargo equally with the owners without reference to any personal fault of his own, but by reason of his accountability for the acts or omissions of his subordinates, as a kind of subrogated principal, says Story, and qualified owner; * * *". *The City of New York* (D. C. S. D. N. Y.), 25 Fed. 149, 152.

Petitioners appear to think (brief p. 15) that there is significance in the fact that section five of the Act of 1851, 46 U. S. 186, after providing that a demise charterer should be deemed the owner thereof within the meaning of the act, states that a ship "when so chartered shall be liable in the same manner as if navigated by the owner thereof". The fact is that the draftsman in the part of the sentence following the semicolon was merely expressing the legal effect of what he had said in the part before the semicolon, i.e., that the ship should not be liable to any greater extent for damage to cargo by fire when navigated by a bareboat charterer than when navigated by her general owner.

Petitioners' argument that the Fire Statute of 1851 should be restricted to *in personam* liability alone because the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 specifically mention both owner and ship (brief 9, 11, 12, 30-1), while the Fire Statute only mentions shipowner, is of no legal weight. As this Court (opinion by Mr. Justice Douglas) said of a similar argument in

United States v. *Stewart*, 311 U. S. 60, 69: "Suggestive as this analysis is, it is entitled to little weight. No mere collation of other statutes can be decisive in determining what the instant statute means. *The meaning of each phrase must be closely related to the time and circumstance of its use.*"

The Carriage of Goods by Sea Act of 1936 was intended to implement the provisions of the Brussels Convention, consented to by the Senate April 1, 1935, the primary purpose of which was to secure international uniformity in ocean bills of lading. The language adopted in the fire clause of the Act was identical with the State Department's translation of the Convention and did not undertake to change the established law of eighty-five years. The Fire Statute was specifically continued in force by the Act (46 U. S. C. 1308).

While it is true, as petitioner states (brief 6, 12), that the bill of lading referred to the Harter Act, it also in the same clause (Ex. 9, clause 26, R. 30 B) referred to the Fire Statute and Limited Liability Act (R. S. 4281, 4282, 4283) and The British Merchants Shipping Act, which latter included the British Fire Statute.

III

CONCLUSION

The Fire Statute, 46 U. S. C. 182, extinguishes maritime liens for cargo damage by fire on the shipowner's vessel as well as the owner's *in personam* liability therefor.

The foregoing shows that the Fire Statute completely exonerates the shipowner from liability for damage to cargo by fire on board his vessel, which necessarily means extinguishing any maritime liens upon his vessel for such losses. This appears (a) from the plain language used in

the Statute, (b) from its legislative history which shows that its purpose was to encourage the American merchant marine and to put it on an equal basis with the English merchant marine, (c) from the liberal interpretation of the Statute by this Court in numerous decisions and (d) by the long line of cases in the lower federal courts covering a period of nearly ninety years since its enactment. It also shows (1) that the maritime lien for cargo loss or damage arises out of the union of cargo and ship which occurs when the cargo is laden aboard pursuant to a contract of affreightment; (2) that the contracts of affreightment in the cause at bar were made by the respondent bareboat charterer with the shippers so that the lien was inseparably connected with the *in personam* liability of such respondent; (3) that there is no reality to the suggestion of any independent contract of affreightment of the master or the vessel even where the bill of lading is signed by the master, as the contract in all such cases remains that of the master's principal, i.e., the respondent charterer in the cause at bar.

Wherefore the final decree below should be in all respects affirmed with costs.

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

October 13, 1943.

(Emphasis throughout is mine.)

APPENDIX A

Chap. XLIII. An Act to limit the Liability of Ship-Owners and for other Purposes, approved March 3, 1851, 9 Stat. 635.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner, or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners, Provided that nothing in this Act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners."[8]

Sec. 2. And be it further enacted, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writng of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable

[8] The proviso was deleted in 1874 (Rev. Stat., 5596); also in carrying the Act over into the Revised Statutes the words "subject to" were omitted; otherwise the section remains as originally enacted and is 4282 of the Revised Statutes. 46 U. S. C. 182.

goods beyond the value and according to the character thereof so notified and entered.[9]

Sec. 3. And be it further enacted, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandize, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.[10]

Sec. 4. And be it further enacted, That if any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares or merchandise, or any property whatever on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive com-

[9] The Act of Feb. 28, 1871, c. 100, 16 Stat. 458, added to the section as originally enacted the following clause immediately after the words "diamonds or other precious stones", to wit, "or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them, contained in any parcel, or package or trunk"; it also added the words "as freight or baggage" after the words "shall lade the same". The section is Revised Statutes 4281, 46 U. S. C. 181.

[10] With the exception of minor verbal changes this section remained as originally enacted until amended in 1935 and 1936 (Aug. 29, 1935, c. 804, par. 3, 49 Stat. 960; June 5, 1936, c. 521, par. 1, 49 Stat. 1480) as an aftermath of the *Morro Castle* disaster to give a greater remedy to claimants for loss of life and bodily injuries, increasing the amount of the limitation fund for their benefit to $60 per gross ton. As amended the section is 46 U. S. C. 183; additional provisions added by the above amendments are 46 U. S. C. 183b and 183c.

pensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.[11]

Sec. 5. And be it further enacted, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.[12]

Sec. 6. And be it further enacted, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss or destruction of goods, wares, merchandize, or other property,

[11] The last sentence of this section was later separated from the rest and made into a new section as 4285 of the Revised Statutes, 46 U. S. C. 185. It was amended to conform to the changes made in Sec. 183 of U. S. C. by the Act of June 5, 1936, c. 521, par. 3, 49 Stat. 1480, previously referred to in footnote 10. The first part of the section is 4284 of the Revised Statutes, 46 U. S. C. 184. Only minor changes have been made from the form in which it was originally enacted.

[12] Only minor changes have been made from the section as originally enacted; it is 4286 of Revised Statutes, 46 U. S. C. 186.

put on board any ship or vessel, or on account of any negligence, fraud or other malversation of such master, officers or mariners, respectively, nor shall any thing herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.[13]

Sec. 7. And be it further enacted, That any person or persons shipping oil of vitriol, unslacked lime, inflammable matches or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandize, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.[14]

This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.[15]

Approved, March 3, 1851."

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[13] Only minor changes have been made to the section as originally enacted; it is 4287 of Revised Statutes, 46 U. S. C. 187.

[14] Only minor changes have been made to the original as enacted; it was Revised Statutes 4288 and is 46 U. S. C. 175.

[15] This limitation sentence was superseded by Act of June 19, 1886, c. 421, par. 4, 24 Stat. 80, reading as follows:

> "The provisions of the six preceding sections, and of sections 175 and 189, shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters."

A minor technical amendment was made June 5, 1936, c. 521, par. 4, 49 Stat. 1481. It was Revised Statutes 4289 and is 46 U. S. C. 188. Section 189 of 46 U. S. C. was Section 18 of the Act of June 26, 1884, c. 121, par. 18 (23 Stat. 57), entitled "An Act to Remove Certain Burdens on the American Merchant Marine and Encourage the American Foreign Carrying Trade and for Other Purposes." This section has not been amended since the enactment.

APPENDIX B

THIRTY-SEVENTH INTERROGATORY: Were not space contracts for the carriage of all merchandise loaded on the Steamship *Venice Maru* at Kobe made by duly authorized representatives of petitioner Kawasaki Line.

Ans. Such space contracts were made by duly authorized representatives of petitioner Kawasaki Kisen Kabushiki Kaisha.

THIRTY-EIGHTH INTERROGATORY: Were not all the contracts of carriage contained in bills of lading, issued for the merchandise stowed on the Steamship *Venice Maru* at Kobe signed by a duly authorized employee of the petitioner Kawasaki Line.

Ans. All bills of lading for cargo loaded on *Venice Maru* at Kobe were signed by duly authorized employees of petitioner Kawasaki Kisen Kabushiki Kaisha.

FORTY-FIFTH INTERROGATORY: State whether the duly authorized general agent of the Kawasaki Line at Nagoya had in July of 1934 full authority to issue under the control and supervision of the petitioners or either of them bills of lading covering cargo shipped at Nagoya on board vessels owned or operated by the petitioners.

Ans. Kamigumi & Co. had authority to issue bills of lading for cargo at Nagoya actually shipped aboard vessels owned or operated by the petitioner Kawasaki Kisen Kabushiki Kaisha.